FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TEXAS,

Petitioner,

—v.—

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF *CERTIORARI* TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan membership organization dedicated to defending the principles embodied in the Bill of Rights. The Texas Civil Liberties Union (TCLU) is its statewide affiliate.

Attorneys associated with the TCLU represented respondent in the Texas state courts. Although respondent has since obtained other counsel, we continue to believe that this case raises important questions about the state's ability to enforce political orthodoxy through the criminal law.

That is the issue around which the ACLU was founded in 1920, and it has

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

remained a critical issue for the ACLU ever since. In the intervening years, the ACLU has appeared before this Court hundreds of times, either as counsel for one of the parties or as amicus curiae.

SUMMARY OF ARGUMENT

At stake in this case is a state's strict accountability for content-based legislation, and the freedom of an individual to use the powerfully symbolic non-violent act of burning the American flag to express dissent from the State's view of nationhood.

Texas Penal Code Ann. §42.09 on its face punishes only flagburning that sends a message likely to "seriously offend" observers. Because the statute turns on audience reaction, it is by its nature content-based. Under the First Amendment,

the State may not penalize speech because it disagrees with either its content or viewpoint.

Section 42.09 is also unconstitutional as applied to respondent in this case. The flagburning at issue here took place during the Republican National Convention, and was part and parcel of a political demonstration protesting the policies of the Reagan Administration. As such, it clearly sent a particular message; the State does not seriously contend otherwise. To the contrary, the State relies on the expressive nature of the flagburning to establish a violation of §42.09, which criminalizes the "desecration of a venerated object" only if it "seriously offends" observers.

In defense of its statute, the State primarily argues that it has the right to preserve the flag as a symbol of national

unity. In fact, that rationale highlights the statute's unconstitutionality. It has been settled law for nearly fifty years that the State may not use its coercive power to command respect for the nation or its symbols. Political symbols, like other forms of speech, must be allowed to clash in the marketplace of ideas.

The State's second asserted interest -- in preventing breaches of the peace -- also fails to justify either §42.09 or its application here. Seeking to prevent violent conflict may be permissible where seeking to prevent ideological conflict is not. Section 42.09, however, prohibits not only flag desecration that incites lawless action or reaction, but reaches any flag desecration likely to "seriously offend" an audience.

In addition, §42.09 is unconstitutionally vague because it is not possible to discern what conduct might "seriously offend" unidentified observers. Such vague language fails to give clear notice of what is prohibited, and chills protected expression. It also creates an impermissible risk that the prosecution, judge, and jury will rely on their own notions of offensiveness in evaluating a defendant's conduct. In this case, that danger is compounded by the introduction of evidence of statutorily irrelevant, constitutionally protected, but potentially "offensive" words uttered by respondent and others.

Because the State's content-based, vague law was applied in this case to suppress protected expression, and because neither the law nor its application is compellingly justified by a neutral state

interest, Johnson's conviction and the law under which it was obtained must fail.

STATEMENT OF THE CASE

Amici adopt the statement of facts set forth in Respondent's Brief. We also emphasize two critical aspects of this case shown most clearly in the brief filed by petitioner, the State of Texas, and in the trial transcript: First, in obtaining Johnson's conviction, the prosecution relied not only on the act of flagburning, but on the words uttered by Johnson during the demonstration at which the flag was burned. Second, the State prosecuted Johnson only for flagburning, and yet introduced testimony of vandalism to suggest that the symbolic flagburning in this case belongs in a category with

property crimes that may constitutionally be regulated.

The jury that convicted heard substantial evidence about what the "protesters" chanted, as well as about the actual flagburning for which Johnson was arrested. Both Texas and the amici supporting it disclaim any attempt to suppress speech critical of the United States. Petitioner's Brief at 40, 41-42; Brief Amici Curiae of Washington Legal Foundation, et al. at 3-5.[2/] Yet the trial record and the State's briefs are filled with references to testimony by the State's witnesses that Johnson and others uttered highly unpopular words and slogans. For example, the Texas

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2/ Hereinafter, Petitioner's Brief will be cited as "Pet. Br. at __," and the Brief Amicus Curiae of Washington Legal Foundation will be cited as "WLF Br. at __." The Record will be cited as "R.II-__."

brief describes the critical testimony as follows:

> Officer Stover saw the United States flag being burned while protesters chanted "America, the red, white and blue, we spit on you." (R.II-91). Officer Stover testified that she was seriously offended by seeing the burning of the flag, though she was not able to see who had burned the flag. (R.II-92).

Pet. Br. at 5. See R.II-90-92, 163-64.

As amici summarize the evidence, "Johnson took the flag along with him as he led the march to the front of Dallas City Hall, shouting along the way, 'Fuck you, America' while 'shooting the finger,' according to one police officer." WLF Br. at 1. See R.II-87. See also RII.78. Were the emphasis on Johnson's words only lawyers' rhetoric in an appellate court it would not be constitutionally problematic. What is important is that all these irrelevant and highly prejudicial statements were

introduced in the record of a trial ostensibly devoted solely to what the State characterizes as a content-neutral charge of flagburning.

In an apparent attempt to give weight to the flagburning charge, the prosecution also introduced evidence that the demonstrators destroyed bank deposit slips and potted plants, R.II-75, 79, 157, and spray-painted on the walls, windows and carpets of various businesses, R.II-76, 79, 81, 85-86. Johnson, however, was not prosecuted for either vandalism or destruction of property.

I. THE TEXAS STATUTE ON ITS FACE ABRIDGES FIRST AMENDMENT RIGHTS BECAUSE IT PROSCRIBES CONDUCT BASED ON ITS CONTENT AND VIEWPOINT

In his concurrence to Smith v. Goguen, 415 U.S. 566, 588 (1974), Justice White distinguished between a statute forbidding

all acts of flag abuse or destruction and a statute criminalizing only acts contemptuous of the flag. As Justice White observed, a statute aimed at contemptuous treatment alone is "not [designed] to protect the physical integrity [of the flag] or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature." Id. Therefore, any conviction for treating a flag "contemptuously" is constitutionally infirm because it depends on the viewpoint expressed by the defendant's conduct.3/

3/ In an accompanying footnote, Justice White noted that Massachusetts had not "construed its statute to eliminate the communicative aspect of the proscribed conduct as a crucial element of the violation." Id. at 588 n.3. Justice Blackmun disagreed. His dissenting opinion concluded that,

> [h]aving rejected the vagueness challenge (continued...)

Texas Penal Code Ann. §42.09 presents precisely the problem that Justice White identified in Goguen -- flagburning is proscribed only to the extent that it will "seriously offend" its audience. Unlike the statute in Spence v. Washington, 418 U.S. 405 (1974), which did not depend "upon whether any particular segment of the State's citizenry might applaud or oppose the intended message," id. at 422-23 (Rehnquist, J., dissenting), this statute ex-

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3/ (...continued)
and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding his conviction, has necessarily limited the scope of the statute to protecting the physical integrity of the flag.

Id. at 591. Whether one agrees with Justice Blackmun that the Massachusetts statute in Goguen had been narrowed to protect expressive conduct, or with Justice White that it had not, it is clear that the Texas Court of Criminal Appeals has not cured the constitutional infirmity of §42.09. To the contrary, the Texas court found that §42.09 was unconstitutional precisely because it reached activity protected by the First Amendment.

plicitly turns on the anticipated reaction of the audience. When a law is "directed at the communicative nature of conduct," the restrictions it imposes "must . . . be justified by the substantial showing of need that the First Amendment requires." Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C.Cir. 1983) (Scalia, J., dissenting), rev'd sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)(emphasis in original).

Twice in the past year this Court has stressed that a statute restricting speech based on its anticipated effect on observers is impermissibly content-based, even where the government itself has not distinguished between viewpoints. Boos v. Barry, 485 U.S. ___, 108 S.Ct. 1157, 1162-

63 (1988); Hustler Magazine v. Falwell, 485 U.S. ___, 108 S.Ct. 876, 882 (1988).4/

Here, the government has hardly remained viewpoint neutral. Its defense of the statute in terms of national unity merely highlights the obvious: that the statute is directed only at those individ-

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4/ Texas contends that the statute does not depend on the reactions of others because a violation could be proved without evidence that any person was seriously offended; proof of action "intentionally designed to seriously offend other individuals" is enough. Pet. Br. at 44. The State's interpretation of the statute does not, however, cure its constitutional infirmity. When a statute turns on even abstract projections as to the reactions of others, it is impermissibly content-based. See e.g., Boos, 108 S.Ct. at 1161 (invalidating a prohibition on signs "designed or adapted" to bring foreign governments or their policies into public odium or public disrepute, without regard to actual negative public reaction); Hustler, 108 S.Ct. at 882 (rejecting an "outrageousness" standard without regard to actual outrage because the standard "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression").

uals who take a different view of the flag than does the State of Texas.

This Court's unwillingness to allow First Amendment rights to be determined by audience reaction is well-grounded in both constitutional theory and recent history. See e.g., Edwards v. South Carolina, 372 U.S. 229 (1963). Without such a rule, the protection afforded to speech would continuously shift with the changing political winds. For example, one can imagine that a pro-segregationist burning an American flag during the 1950's and 1960's would not have been prosecuted under this statute when many supported the belief that the federal government was invading states' rights. Today, when overt opposition to integration has become less popular, that same segregationist would reasonably anticipate prosecution. Similarly, if Johnson had

announced that he supported the President's policies in Central America and then burned his flag as a memorial to the Contras who died fighting in Nicaragua, it is entirely plausible that he would not have been prosecuted or, if prosecuted, not convicted.

Because no compelling state interest justifies §42.09's content-based speech restriction, see infra Point III, the statute is unconstitutional on its face.

II. THE TEXAS STATUTE WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE BECAUSE THE FLAGBURNING WAS SYMBOLIC EXPRESSION PROTECTED BY THE FIRST AMENDMENT

There is no doubt that the flagburning in this case was an act of political symbolism, and that it was clearly perceived as such by everyone who observed it. Even

the State did not argue otherwise below. 706 S.W.2d 120, 123 (Tex.App. 1988).5/

The Texas courts were also unanimous on this point. The Texas Court of Appeals, which affirmed Johnson's conviction, and the Texas Court of Criminal Appeals, which reversed it, each found that respondent's conduct was entitled to heightened First Amendment scrutiny because "Johnson intended to convey a particularized message, his dissatisfaction with the Reagan Administration's policies," and that message was "very likely to be understood by those who

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5/ "If the government were to contend that [respondent was] not engaged in expressive conduct, it would be confessing that [respondent] did not commit the crime charged." Kime v. United States, 459 U.S. 949 (1982)(Brennan, J., dissenting from denial of certiorari).

viewed it." 706 S.W.2d at 123; accord, 755 S.W.2d 92, 95 (Tex.Crim.App. 1988).6/

To claim that this case does not involve symbolic expression is to ignore the holdings of this Court in cases like Spence, 418 U.S. 405, Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), Brown v. Louisiana, 383 U.S. 131 (1966), and Stromberg v. California, 283 U.S. 359, 368-70 (1931), all of which held the First Amendment applicable to non-verbal acts intended to express a clear political message.7/

6/ This conclusion echoes the comment of Justice Rehnquist in Smith v. Goguen, who noted in dissent:

> I have difficulty seeing how Goguen would be found by a jury to have treated the flag contemptuously by his act and still not have expressed any idea at all.

415 U.S. at 593.

7/ It is, of course, a truism that not all symbolic expression is immune from government action.

(continued...)

Like the defendant in Spence, the respondent here intended "to convey a particularized message . . . and in the surrounding circumstances the likelihood was

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7/ (...continued)
A "misdemeanor is not excused merely because it is an act of flamboyant protest." Street v. New York, 394 U.S. 576, 617 (1969)(Fortas, J., dissenting). But most criminal statutes have a justification independent of any message communicated by the actor. Section 42.09, however, has no rationale except to prohibit political messages offensive to the State's conception of national unity. See infra Point IIIA.

By contrast, another subdivision of the same statute prohibits the desecration of publicly or privately owned monuments or burial sites. See §§42.09(a)(1) and (2). Such acts may be prohibited without offense to the First Amendment because the Constitution does not protect the desecration of someone else's cherished property. Section 42.09 (a)(3), however, applies regardless of whose flag is desecrated.

Although Texas tries to suggest in its brief that the flag that Johnson was convicted of burning was stolen from a bank building, the jury was not asked to find this, and made no such finding. Texas concedes this when it says only that the flag was "in all probability . . . taken from the Mercantile Bank building's flagpole." Pet. Br. at 45.

great that the message would be understood by those who viewed it." 418 U.S. 411-12. Like Spence, therefore, this is "a case of prosecution for the expression of an idea through activity." Id. at 412.8/

The fact that respondent's views might have been expressed in other ways is constitutionally irrelevant. See Consolidated Education Co. v. Public Service Comm'n, 447 U.S. 530, 541 n.10 (1980). As this Court has recognized in political protest cases, the medium is often the message. For example, in Brown v. Louisiana, plaintiffs conveyed their civil rights message in a way that pickets or letters could not: "They sat and stood in the room, quietly,

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8/ When the prosecution introduces evidence of the words spoken during a flagburning, as it did here, it creates an unacceptable risk that the jury will convict based on its perception of the "serious offense" created by defendant's words rather than his deeds. Cf. Street, 394 U.S. 576.

as monuments of protest against the segregation of the library," 383 U.S. at 139. This Court acknowledged that their "silent and reproachful presence" was uniquely expressive and therefore protected by the First Amendment. Id. at 141-42. Similarly, in Cohen v. California, 403 U.S. 15, 27 (1971), the use of particular words was protected because they conveyed "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."

In short, there can be no doubt that the flagburning in this case was part of the protesters' message of opposition to the Reagan Administration and its policies, and that the flagburning itself added an expressive dimension that words could not supply.

III. NO COMPELLING STATE INTEREST UNRELATED TO EXPRESSION JUSTIFIES CRIMINALIZATION OF THE SYMBOLIC FLAGBURNING IN THIS CASE

Texas offers two rationales to justify the restriction of Johnson's First Amendment rights: preservation of the flag as a symbol of nationhood and national unity, and avoidance of breaches of the peace. Each of these asserted state interests fails to justify §42.09's restriction of symbolic expression.

A. The State Cannot Promote Its Interest In Preserving The Flag As A Symbol of National Unity By Prohibiting Symbolic Dissent

The main rationale Texas puts forward in support of §42.09 is that the State's interest in protecting the flag as a symbol of national unity outweighs Johnson's rights under the First Amendment to make forceful and pointed criticism of the national administration by burning a flag.

Pet. Br. at 19-30; WLF Br. at 6-12. The State characterizes the flag as a symbol so cherished that it can be made sacrosanct. But as this Court has repeatedly held, the State cannot force respect for national symbols, especially through the coercive power of the criminal law.

Justice Jackson's opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), quoted countless times over half a century, is one of the most important statements of our American ideal of individual self-accountability in matters of patriotic faith:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Writing in the middle of the Second World War, Justice Jackson strove to retain an impartial constitutional perspective:

> The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own . . . .
>
> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Id. at 641-2.

The State's contention that the principles of Barnette do not apply in this case is based on a distinction between forcing respect and forbidding disrespect. Pet. Br. at 24-27. That distinction was rejected by this Court in Street when it held that the appellant could not constitutionally be punished for the statement "we don't need no damn flag." 394 U.S. at 593. The Court in Street specifically relied on

Barnette when it established that the constitution protects the right to express contempt for the flag, as well as the freedom not to express respect. Id., quoting Barnette at 641-42. See also Goguen, 415 U.S. at 589 (White, J., concurring).

The State's argument in this case boils down to the claim that its use of the flag as a political symbol is more important than respondent's use of the flag as a political symbol. In our system of government, however, that judgment must be made in the marketplace of ideas and not through the forcible suppression of one political viewpoint in favor of another. Just as the State of New Hampshire could not force its citizens to pay homage to the political slogan "Live Free or Die," Wooley v. Maynard, 430 U.S. 705 (1977), the State of Texas cannot force its citizens to pay hom-

age to "venerated objects" designated by statute. As Justice Brandeis recognized years ago, the answer lies in more speech, not "enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring).

Furthermore, because the State in this case is attempting to reserve the use of the flag for its own patriotic purposes, it cannot rely on the diminished scrutiny applied in United States v. O'Brien, 391 U.S. 367 (1968), to justify §42.09 either on its face or as applied to respondent. The government interest asserted in O'Brien -- to ensure the effective administration of the Selective Service system -- did not depend on the symbolism of the regulated draft cards. In contrast, the State's interest in preserving the flag as a symbol of national unity is to suppress opposing

political views like those expressed by Johnson in this case. When the State's object is to control a form of expression, its chosen means must be subjected to the strictest First Amendment scrutiny, and the relaxed standard of O'Brien is wholly inappropriate. Under strict scrutiny, the State's attempt to justify §42.09 as a means of monopolizing the flag's expressive power is constitutionally insufficient. See Spence, 418 U.S. at 415 n.8; Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv.L.Rev. 1482, 1503 (1975).9/

9/ The only interest unrelated to expression that the State offers in support of the statute is its interest in preserving the peace, but as already noted, supra n.4, the State takes the position that no breach of the peace need in fact be threatened for §42.09 to apply.

Even if the State's interest in preserving the flag as a symbol of nationhood were a legitimate interest unrelated to the suppression of expression, there is no basis upon which this Court can conclude that burning the flag undermines that interest. Cf. Tinker, 393 U.S. at 508. It is because the flag is such a powerful symbol that people choose to burn it to express dissent. Far from diminishing the flag's symbolic value, such politically expressive flagburning is a reminder of the freedom this country affords its political dissidents.

B. Section 42.09 Is Not Narrowly Tailored To Serve The State's Interest In Preventing Breaches Of The Peace

The State's interest in preventing breaches of the peace, while legitimate in the abstract, neither justifies the statute's explicit focus on the content of the

proscribed speech, nor deprives the symbolic flagburning in this case of its protected status.

Only two categories of speech restrictions have been deemed by this Court to be constitutionally unprotected in the name of keeping the peace. The Texas statute does not fall within the first such category, restrictions on "fighting words," because it does not proscribe only expression that has "a direct tendency to cause acts of violence by the person to whom, individually, the [expression] is addressed." Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)(emphasis added). The "fighting words" exception is not available when the expression sought to be proscribed is not "directed at the person of the hearer." Cohen, 403 U.S. at 21, quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).

The statute is also not limited to the kind of speech unprotected under Brandenburg v. Ohio, 395 U.S. 444 (1969). As definitively construed by the Texas court, the statute prohibits more than Brandenburg allows: "One cannot equate 'serious offense' with incitement to breach the peace." 755 S.W.2d at 96. The Court of Criminal Appeals correctly applied the Brandenburg standard when it reversed Johnson's conviction on the ground that "there was no breach of the peace, nor does the record reflect that the situation was potentially explosive." Id. at 95-6. Because §42.09 is not limited to restricting expression that is both "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action," Brandenburg, 395 U.S. at 447, it is not narrowly tailored to serve the

State's asserted interest in avoiding breaches of the peace.

To uphold a restriction on communication because it might lead to violence by those offended by it is to invite the majority to silence those with unpopular views. This Court has long rejected that invitation. See e.g., Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); Coates v. Cincinnati, 402 U.S. 611, 616 (1971).

IV. SECTION 42.09 IS UNCONSTITUTIONALLY VAGUE

If §42.09 forbade all flagburning, it might have run counter to federal laws encouraging flagburning as a respectful way to dispose of old flags, 36 U.S.C. §176(k), but at least it would have been clear. Instead, the Texas statute forbids only desecration of a flag "in a way that the actor knows will seriously offend one or

more persons likely to observe or discover his action."

Because the criminal consequences of burning a flag thus depend on the degree of reverence or offensiveness with which it is done, "men of common intelligence" must guess when burning a flag might subject them to criminal sanction under §42.09. See Goguen, 415 U.S. at 574, quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1932). Faced with such uncertainty, persons who would use the flag to convey a message will be chilled by the fear of criminal sanctions. See Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Even more constitutionally problematic than the statute's failure to give clear notice is that its vagueness gives the police and prosecutors wide discretion to punish those whose views they do not like,

as they did here, and to tolerate the actions of others. See Kolender v. Lawson, 461 U.S. 352, 358 (1983); Goguen, 415 U.S. at 574. The language of the Texas statute, like that of the Massachusetts statute struck down in Goguen, is "so indefinite that the police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." Goguen, 415 U.S. at 578.

V. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

The Court granted certiorari on the question whether the public burning of an American flag constitutes free speech subject to the protection of the First Amendment, but this case is an inappropriate vehicle for resolution of that question. Johnson's conviction for flagburning was obtained under a statute which on its face

depends on the reactions of observers to the proscribed conduct. The statute is therefore content-based and must be struck down regardless of whether burning a flag in political protest is protected by the First Amendment. Because such a resolution of this case would not decide the question to which the writ of certiorari was addressed, the writ should be dismissed as improvidently granted.

CONCLUSION

It is ironic that the following inscription to the Confederacy appears in front of the Texas State Capitol:

> THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT OF 1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM THE FEDERAL COMPACT IN 1861. THE NORTH RESORTED TO COERCION. THE SOUTH, AGAINST OVERWHELMING NUMBERS AND RESOURCES, FOUGHT UNTIL EXHAUSTED.

Not everyone in Texas or in the United States takes quite that romantic a view of the Civil War. But the First Amendment protects the rights of Texans to express this idea of national disunity. It protects equally the right of Gregory Johnson to do what he did in this case.

The judgment below should be affirmed. Alternatively, the writ of certiorari

should be dismissed as improvidently granted.

Respectfully submitted,

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Dated: January 25, 1989